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In the Supreme Court of the United States

OCTOBER TERM, 1973

73-1773

EARL R. FOSTER, Petitioner,

v.

DRAVO CORPORATION

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CHARLES R. VOLK,
ROBERT H. SHOOP, JR.,
THORP, REED & ARMSTRONG
2900 Grant Building
Pittsburgh, Pennsylvania 15219
Attorneys for
DRAVO CORPORATION

CLYDE H. SLEASE, *General Counsel*
DRAVO CORPORATION
One Oliver Plaza
Pittsburgh, Pennsylvania 15222

Financial Press Corporation, Pittsburgh (412) 391 2063

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Thorp, Reed & Armstrong, on behalf of Dravo Corporation, files this Brief in opposition to the Petition of the Solicitor General for Certiorari in the within matter.

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Whether an employee, solely by reason of his military service, is entitled to accrue and automatically receive vacation pay without having met the valid earnings requirement set forth in the Collective Bargaining Agreement. (Answered in the negative by the Third Circuit Court of Appeals).

2. Whether an employee who received all vacation benefits due him at the time of his induction into the military service is entitled to a pro rata vacation solely by reason of his military service.

(Remanded by the Third Circuit Court of Appeals to the District Court for a determination if the issue was properly raised and litigated in that Court).

COUNTER-STATEMENT OF THE CASE

Petitioner Earl R. Foster was initially employed by Dravo Corporation (Dravo) on August 5, 1965, and worked for Dravo until he was inducted into the Armed Services of the United States on March 6, 1967. When Petitioner left Dravo he was awarded all vacation benefits which were then owed to him. Foster served in the military until October 1, 1968, and was restored to his previous position by Dravo on October 7, 1968. Upon his return to work, he was given credit for his military term in computing the length of his vacation benefits.

After his reinstatement, Foster requested that Dravo grant him vacation pay for 1967 and 1968. Article XIV, Section 2, of the Collective Bargaining Agreement, provides in the pertinent part that an employee to be eligible for vacation benefits "must have received earnings in at least twenty-five (25) work-weeks in the twelve (12) months immediately preceding the current December 31st." Nowhere in the Collective Bargaining Agreement is it stated that while a person is in the military or on leave of absence, is he considered to be earning wages from Dravo.

Since Foster had worked for Dravo for only nine weeks in 1967 and for only thirteen weeks in 1968, Dravo refused Petitioner's request for vacation pay. Dravo's refusal was based on the aforementioned provision of the Collective Bargaining Agreement that since Foster "had not received earnings in at least twenty-five work-weeks" he was not entitled to vacation benefits.

Petitioner thereupon instituted suit in the United States District Court for the Western District of Pennsylvania on the grounds that Dravo had violated Section 9 of the Military Selective Service Act of 1967, 50 U.S.C. App. §459, by denying him vacation benefits.

The District Court, in an Opinion and Order dated November 3, 1972 (Pet. App. C.), held that Foster was not entitled to vacation pay in 1967 and 1968 because he failed to satisfy the requirement of having received earnings in at least twenty-five work-weeks.

On appeal to the Court of Appeals for the Third Circuit, the Court candidly recognized that in two similar cases, circuit courts[1] eschewed careful analysis of the provisions of the collective bargaining agreements in question. While these cases were determined in a manner contrary to the instant case and a prior decision of the Tenth Circuit Court of Appeals,[2] no analysis of the earnings requirement for vacations was made in either case.

The Third Circuit recognized that matters of "seniority rights derive their scope and significance from Union contracts."[3] The Court further recognized that Collective Bargaining Agreements must be given an interpretation that is realistic in the context of the entire Collective Bargaining Agreement as a whole and the every-day realities of Labor-Management relations. The Court did not find the contract ambiguous, as alleged by the Petitioner, but stated simply, early in the Opinion, "Although the language of the contract requiring the employee simply to receive earnings in at least twenty-five weeks is arguably ambiguous, it is not realistic to surmise that any employee could work for substantially less than the number of hours customarily regarded as constituting a full work-week for any period of time without being discharged." (Pet. App. A, p. 14A). Moreover, the Court found that granting the Petitioner's request would "in effect, be granting to the returning veteran a windfall at the expense

1. *Locaynia v. American Airlines, Inc.*, 457 F.2d 1253 (9th Cir., 1972)Cert.den., 409 U.S. 982; *Ewert v. Wrought Washer Mfg. Co.*, 477 F.2d 128, (7th Cir. 1973)
2. *Kasmeier v. Chicago, Rock Island and Pacific R.R. Co.*, 437 F.2d 151 (10th Cir. 1971)
3. *Aeronautical Lodge 727 v. Campbell*, 337 U.S. 521 (1949)

of his employer and be discriminating against employees who are required to meet the conditions of the Collective Bargaining Agreement if they are to receive vacation benefits." (Pet. App. A., p. 17A).

The Third Circuit remanded the case to the District Court for a determination as to whether the issue of pro rata vacation benefits was properly raised and litigated at the trial level.

REASONS FOR DENYING THE WRIT

1. This Court has long recognized that it would be a distortion of the language and intent of the Military Selective Service Act[4] to provide returning veterans greater rights and benefits than would have been accrued to them had they not entered the military service. *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275,285 (1946). To establish whether the veteran is being penalized because of the time spent in the service of his country, the Third Circuit correctly determined that the court must, in the first instance, review the Collective Bargaining Agreement in effect to determine what benefits the employees received who remained active on the employment roles of the Company. The Third Circuit determined that the employees who were not in the military service were required to receive earnings in twenty-five full work-weeks, and the Petitioner's "failure substantially to comply with this case precludes his claim to full vacation benefits." (Pet. App. A. p. 17A)

Therefore, in each case, the Court must review the Collective Bargaining Agreement and determine how the employees who did not enter the military were treated. After that determination is made, the case of the returning veteran is examined to determine if he is being prejudiced or discriminated against.

Thus, this Court, in granting the Petitioner's request, will not resolve whatever conflict may exist in the circuit courts, because each case must be determined on an individual basis. However, in no instance should the returning veteran be granted a windfall simply as a result of his having entered the military service.

4. 50 U.S.C. App. 459 et seq.

2. The question at issue concerns only the Petitioner's *eligibility* for vacation pay and not the amount of vacation to be received. The latter is clearly a perquisite of seniority, and Petitioner was given proper credit for his military term in determining the amount of his Vacation.

Petitioner believes the circuit court decisions which rely upon *Accardi v. Pennsylvania Railroad Co.*, 383 U.S. 225 (1966), and *Eagar v. Magma Copper Co.*, 389 U.S. 323 (1967), and provide credit for a veteran's military service in the determination of vacation eligibility, were correctly decided. However, in relying on *Accardi*, it must be recognized that the case involved severance pay benefits--not vacation eligibility. Moreover, any argument based on *Accardi*, in the instant situation, relies entirely on an extreme hypothesis, not recognizing the exigencies of the situation provided for in the Collective Bargaining Agreement at issue when read as a whole. Reference to other sections of the Agreement for layoffs, hiring, and most important--discharge for proper cause all guard against any prejudice to the returning veteran.

An analysis of the Collective Bargaining Agreement makes it clear that the "bizarre results" of *Accardi* are not possible here and that vacation pay is not a benefit which "automatically accrues (to a Dravo employee)." *Accardi v. Pennsylvania R. Co.*, 383 U.S. at 229-230.

Moreover, reliance on this Court's one-sentence Per Curium Opinion in *Eagar v. Magma Copper Co.*, *supra*, is also misplaced. An examination of all the facts in *Eagar* reveals that Plaintiff had completed the substantive "work requirements" in working seventy-five per cent of his available shifts in the previous year to qualify him for vacation pay. He had earned his vacation. The benefits to which he was entitled were automatic. Once the vacation is substantively earned, as in *Eagar*, it automatically accrues as a perquisite of seniority.

Furthermore, that finding does not require that all attributes of vacation fall within "seniority, status, and pay." Nor does it foreclose the use of a valid work requirement before eligibility for vacation pay accrues.

3. The issue of Foster's pro rata share of his vacation benefits for the years 1967 and 1968 is not properly before this Court. The question of pro rata benefits was never mentioned by Petitioner in his Complaint, nor was the question of pro rata relief raised by Petitioner or litigated at the trial level.

This Court has long recognized that unless there are exceptional circumstances, appellate courts consider only specific questions which were raised and litigated at the trial court level. *McGrath v. Manufacturers Trust Co.*, 338 U.S. 241 (1949); *Dunn v. United States*, 284 U.S. 390 (1932); *Blair v. Oesterlein Co.*, 275 U.S. 220 (1927).

The Third Circuit recognized that the Complaint stated only a general claim for vacation benefits and no specific averment relating to the pro rata benefits.

It was further recognized that the District Court urged the parties to reach a compromise along the lines of providing pro rata benefit. The Third Circuit, based on the circumstances of the case, remanded any claim for pro rata benefits to the District Court for a determination of whether the question of Foster's right to pro rata benefits was properly raised in the District Court and if so raised, the District Court was to make a decision on the merits.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

CHARLES R. VOLK
ROBERT H. SHOOP, JR.
THORP, REED & ARMSTRONG
2900 Grant Building
Pittsburgh, Pennsylvania 15219

Attorneys for
DRAVO CORPORATION

CLYDE H. SLEASE, *General Counsel*
DRAVO CORPORATION
One Oliver Plaza
Pittsburgh, Pennsylvania 15222

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